IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 25.11.2004

CORAM:

THE HONOURABLE MR.JUSTICE V.KANAGARAJ

WRIT PETITION NO.8288 OF 1997

M/s.Himu Accessories (Private)Ltd.
Thiruvanmiyur, Chennai-41. .. Petitioner

Vs.

1. The Assistant Commissioner of
   Central Excise,
   Madras VI Division,
   Chennai-18.
2. The Commissioner of Central
   Excise (Appeals),
   Chennai-34.
3. The Customs Excise and
   Gold Control Appellate
   Tribunal, Chennai-6. .. Respondents

Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorari as stated therein.

For petitioner : Mr.R.Thiagarajan,S.C.
for Mr.M.Muthappan.
For respondents : Mr.K.Veeraraghavan
ACGSC for RR1 & 2
R3- Tribunal.

* * *

O R D E R

The above Writ Petition has been filed by the petitioner praying to issue a Writ of Certiorari to call for the records relating to the proceedings of the third respondent/Customs, Excise and Gold Control Appellate Tribunal in Order No.1051/97, dated 10.4.1997, confirming the order of the Commissioner (Appeals) dated 30.10.1995 in A.No.190/1995(M), confirming the order of the Assistant Commissioner of Central Excise dated 28.3.1995 in Order No.V/87/15/4/94/T1 and quash the same.

2. In the affidavit filed in support of the above writ petition, the petitioner would submit that the petitioner is engaged in the manufacture of Excisable goods falling under Chapter 87 of the Central Excise Tariff Act, 1985; that the

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petitioner is eligible to avail Modvat Credit for the inputs received by it; that petitioner has availed higher Notional Credit as provided for under Rule 57-B in respect of inputs received from Small Scale Industries eligible for concession under Central Excise Notification No.175/86 to the tune of Rs.2,36,471.50 in RG-23A Part II on 18.8.1993 in respect of inputs received during 1.4.1992 to 21.11.1992.

3. The petitioner would further submit that the Superintendent of Central Excise, Madras VI Division issued a show cause notice dated 31.1.1994 called upon the petitioner to show cause as to why the sum of Rs.2,36,471.50 availed by the petitioner should not be recovered and as to why penalty should not be imposed for wrong availing of Modvat Credit under Rule 173(Q) of the said Rules; that the petitioner sent his detailed reply on 8.4.1994; that the Assistant Commissioner of Central Excise by order dated 28.3.1995 ordered recovery of the said sum of Rs.2,36,472 under Rule 57-I of the Central Excise Rules; that the appeal preferred by the petitioner to the Commissioner (Appeals) was also dismissed by order dated 30.10.1995 confirming the findings of the initial authority; that the further appeal before the Customs, Excise and Gold Control Appellate Tribunal, Southern Regional Bench was also dismissed by order dated 10.4.1997. Aggrieved by the order of the Tribunal, the petitioner has come forward to file this Writ Petition praying for the relief extracted supra.

4. Heard the learned senior counsel for the petitioner and the learned Additional Central Government Standing Counsel for the respondents.

5. During arguments, the learned Senior Counsel appearing for the petitioner would submit that the Assistant Commissioner of Central Excise has no jurisdiction to adjudicate the matter by reason of the Circular dated 14.5.1992 of the Central Board of Excise and Customs that the Modvat Credit has been availed as per Rule 57(B); that the rules did not prescribe any period of limitation within which the Credit should be availed; that the failure to avail credit immediately on receipt of the goods does not extinguish the right to avail the credit and that the proposed action of the respondents is without jurisdiction.

6. The learned senior counsel would further submit that admittedly for the period from 1.4.1992 to 31.3.1993 the petitioner availed the credit on 18.8.1993 is the crucial date and at that time there was no period of limitation as prescribed by the Rules, nor do the Rules prescribe when the petitioner must avail the credit then and there as and when he received the duty paid inputs; the learned senior counsel would further submit that the amended Rule 57G in sub-rule (2) was

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introduced only on 29.6.1995 to the following effect:-

> "(i) after the first proviso, the following proviso shall be inserted namely:-
> "Provided further that the manufacturer shall not take credit after six months of the date of issue of copy of the documents specified in first proviso to this sub-rule:"

The learned senior counsel would further submit that the said amended Rule came into force on and from 29.6.1995, the respondent cannot seek to apply that amended Rule to show that the credit availed by the petitioner on 18.8.1993 and the same is barred by limitation. At this juncture, the learned senior counsel would cite a decision of the Hon'ble Apex Court reported in VOL.42-1989 ELT 515 (GOVERNMENT OF INDIA v. CITEDAL FINE PHARMACEUTICALS), wherein it has been held:

> "In the absence of any period of limitation it is settled that every authority is to exercise the power within a reasonable period. What would be reasonable period, would depend upon the facts of each case and whenever a question regarding the inordinate delay in issue of demand notice is raised, it would be open to the assessee to contend that it is ad on the ground of delay."

7. The learned senior counsel would further submit that in the absence of any such period of limitation, the credit availed by the petitioner on 18.8.1993 is reasonable. What is the reasonable period in the case of manufacturer of motor parts is then and there he has to necessarily consolidate at the time he makes on the final product he will claim the benefit of the credit. Since the Rule 57(g)(2) having been amended only on 29.6.1995 and the credit availed by the petitioner is prior to that amendment i.e. on 18.8.1993, the question of availing the benefit within six months does not arise to the petitioner's case; that even the availing of credit by the petitioner is within 8 months. On such arguments he would pray for the relief extracted supra.

8. The learned Additional Central Government Standing Counsel besides filing counter affidavit, would argue to the effect that under the scheme of Modvat Credit as it stood during the relevant time, Rule 57B under which notional credit was taken, did not provide any time limit; that as per the ratio of the Hon'blel Supreme Court Judgment quoted above, any right of demand conferred on the executive should be exercised within a reasonable time and equally any right to credit by the claimant may also be exercised within the reasonable time limit; that time is the essence for both executive action and for public claim; that this ratio fixed by the Supreme Court

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referred to above has been rightly followed by the adjudicating forums in deciding the issue.

9. The learned Additional Central Government Standing Counsel would further submit that in regard to competency to adjudicate the case, the administrative instructions issued by the board in 1992 are generally interpreted to be meant for the offence cases involving contravention of Rules and Act; that the Technical issues as in this case are decided by the Assistant Commissioner without any monitory limit; that the very fact that the Assistant Commissioner did not impose any penalty borne out that the issue has been considered as Technical issue; that even in case the administrative instructions of the board as claimed by the petitioner have been exceeded by the adjudicating authority, it may not make the order illegal on that sole ground alone.

10. The learned Additional Central Government Standing Counsel would further submit that as held by the Supreme Court, in the absence of any period of limitation, the authority is to exercise powers within a reasonable period, and what would be the reasonable period would depend upon the facts of each case, and hence applying the principles of "reasonable period" in the absence of specific period, orders were passed and that no reasons were assigned for such belated taking of credit; that the order dated 28.3.1995 passed by the first respondent considering that the 6 months period as the reasonable time for taking credit presumably is in line with the period of limitation of 6 months for demand under Section 11A and for refund under Section 11B of Central Excise Act 1994, as they stood at the relevant time was upheld by the second and third respondents, and hence their reasoning is based on legal principles enunciated by Court of Justice. On such arguments, he would pray for dismissal of the above writ petition.

11. In consideration of the facts pleaded, having regard to the materials placed on record and upon hearing the learned counsel for both, the point that is arise for consideration before this Court is whether the higher notional credit under Rule 57B can be availed at a later date other than the date of receipt of the inputs? The contention of the petitioner is that there is no time limit to take higher notional credit under Rule 57B. On the part of the petitioner he would cite the case law from the reported case in Central Excise, Bangalore Vs. Mysore Lac and Paints (1991 (52)(ELT) 590) whereunder it has been held that "in the absence of any specific rule it has to be held that within a reasonable time the petitioner could have taken credit due to them provided they satisfy the other criteria for eligibility of MODVAT credit". In the instant case there is no dispute about the eligibility of the

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petitioner in availing of the MODVAT credit, but it is not as if the petitioners could avail it at any time at their will and pleasure and that the time taken by the respondents as per their orders impugned herein is six months to be the reasonable time, whereas the time taken by the petitioner is 8 months and therefore, since the petitioners have failed to avail the benefits within the reasonable time in taking credit, it has been decided by the respondents that the petitioner/assessee was not eligible for the higher notional credit even after six months. The authorities would also cite certain other instances whereunder the reasonable time having been fixed by the Tribunals being only six months adopting the same a decision has been arrived at to recover the amount of Rs.2,36,472/- under Rule 57(I) of the Central Excise Rules 1944 from the petitioner without imposing any penalty and it is this order passed by the respondents is under challenge by the petitioner.

12. Though on the part of the petitioner he would attempt to afford reasons for the delay having caused, there is no denying of the fact that the delay is for 8 months and since the authorities have taken six months to be the reasonable time in the absence of any specific provision provided for availing such benefits depending upon the facts and circumstances of the case and following the principles of "reasonable period", orders have been passed and since no proper reasons have been assigned on the part of the petitioner for such belated taking of credit, orders have been passed by the respondent particularly the first respondent as per its order dated 28.3.1995 considering six months period as reasonable time for taking credit which also falls in line with the period of limitation of six months fixed for demand under Section 11A and for refund under Section 11B of the Central Excise Act 1994, as they stood at the relevant time and hence the said order has been upheld by the second and third respondents.

13. Since their reasoning is based on legal principles enunciated by the propositions of the upper forums of law, this Court does not feel it necessary to cause its interference into such of the concurrent findings arrived at by all the three respondents alike and making inroads in any manner for the purpose of the case of the petitioner which would only jeopardise the general discipline adopted by the authorities in such matters and therefore, this Court is of the view not to cause its interference in the manner it is prayed for on the part of the petitioner company and therefore in all respects it would be reasonable only to confirm the orders impugned herein and hence the following order:

In result,

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(i) the above writ petition does not merit acceptance and it becomes only liable to be dismissed and is dismissed accordingly;

(ii) however, in the circumstances of the case, there shall be no order as to costs.

25.11.2004.

gr.

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

To
1. The Assistant Commissioner of Central Excise, Madras VI Division, Chennai-18.
2. The Commissioner of Central Excise (Appeals), Chennai-34.
3. The Customs Excise and Gold Control Appellate Tribunal, Chennai-6.

1 cc to Mr.M.Muthappan, Advocate SR.51359
1 cc to Mr.K.Veeraraghavan, SCCG. SR.51016

mdr (co)
dv

PRE DELIVERY ORDER IN W.P.NO.8288 OF 1997

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